Supreme Court, U.S.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

UNITED STATES OF AMERICA ex rel.

THOMAS TESTA,

Petitioner,

vs.

RICHARD B. GRAMLEY, Warden,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

FREDERICK F. COHN
205 W. Wacker Drive
Chicago, Illinois 60606
(312) 641-0692
Attorney for Petitioner

59pp

(1a) QUESTIONS PRESENTED

Whether defendant's 8th and 14th Amendment rights are violated by application of a statute that permits substantial enhancement of a sentence - from a possible 6 to 30 years, to a possible 30 to 60 years - where a sentencing entity finds the offense was "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty," Ill.Rev.Stat., ch. 38, par. 1005-5-3.2(b)(2), where neither State statute nor State decisional law defines that phrase, so that a sentencing court's decision can be totally arbitrary and capricious, contrary to this Court's constitutional holdings in Maynard v. Cartwright, 486 U.S. 356, 100 L.Ed.2d 372 (1988), and Godfrey v.

Georgia, 446 U.S. 420, 64 L.Ed.2d 398 (1980).

2. Whether the decision below, rejecting the above argument by denying habeas relief, conflicts with principles of federal constitutional law expressed by this Court in Maynard v. Cartwright, 486 U.S. 356, 100 L.Ed.2d 372 (1988), and Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 (1980), since there is no rational basis for limiting such principles to death penalty cases and not applying such principles to term-of-years sentences, as here.

3. Whether certificate of appealability should have been allowed to permit review by the Court of Appeals

of the issues presented in this case, which involve questions which are (i) deserving of review and (ii) clearly debatable among reasonable jurists.

1(b) PARTIES INVOLVED

Petitioner, Thomas Testa, was the Petitioner in the U.S. District Court for the Northern District of Illinois, and Petitioner-Appellant in the U.S. Court of Appeals for the 7th Circuit.

Respondent, Richard B. Gramley, Warden, was the Respondent[1] in the U.S. District Court for the Northern District of Illinois, Eastern Division, and Respondent-Appellee in the U.S. Court of Appeals for the 7th Circuit.

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[1] By order of the District Court dated October 16, 1997, Kenneth Dobucki, Warden, the originally designated party respondent, was dismissed from the action and Richard B. Gramley, Warden, was substituted as party respondent. (App. A, p. App. 10, fn. 1)

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The District Court, via unreported order, denied habeas relief on October 16, 1997 (App. A, pp. App. 1-21), and declined to issue certificate of appealability. (See App. B, p. App. 22-23.)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Thomas Testa, (hereafter, petitioner, or defendant), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the 7th Circuit, allowing to stand, by denying certificate of appealability, the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, denying his petition for writ of habeas corpus - by which habeas action he sought relief from his conviction for rape and extended term sentence of 50 years.

Judgment and Orders Below

The Judgment sought to be reviewed

is the Memorandum Opinion and Order of the District Court dated October 16, 1997, denying habeas relief (App. A, pp. App. 1-21), which the 7th Circuit permitted to stand when it denied certificate of appealability by Order of October 13, 1998. (App. B, pp. App. 22-23) These Orders are unreported.

Jurisdictional Statement

On October 13, 1998, the Court of Appeals issued its Order (App. B, pp. App. 22-23) denying certificate of appealability, which allowed to stand the judgment of the District Court denying habeas on October 17, 1997. (App. A, pp. App. 1-21)

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28

U.S.C. § 1254(1) and Rules 10, 12 and 13 of this Court.

Basis for Federal Jurisdiction

The basis for federal jurisdiction in the court of first instance - the District Court - is based on 28 U.S.C. § 2254(a).

Constitutional Provisions and Statutes Involved

The 8th Amendment to the U.S. Constitution, and due process clause, 14th Amendment to the U.S. Constitution.

Ill.Rev.Stat., ch. 38, par. 1005-5-3.2(b)(2); Ill.Rev.Stat., ch. 38, par. 1005-8-2; Ill.Rev.Stat., ch. 38, par. 1005-8-1. (Text set out in App. C, pp. App. 24-25)

STATEMENT OF THE CASE

Petitioner, Thomas Testa, an

Illinois State prisoner (hereafter, defendant), sought to appeal from the District Court's judgment denying his petition for a writ of habeas corpus, in which defendant raised, *inter alia*, the claim that his extended term sentence violated his rights under the 8th and 14th Amendments to the United States Constitution, in that the statutory provision was unconstitutionally vague in violation of due process. The District Court denied habeas in a Memorandum Opinion and Order. (App. A; pp. App. 1-21) The 7th Circuit denied petition for certificate of appealability (App. B, pp. 22-23) No petition for rehearing was filed.

STATEMENT OF FACTS

Defendant was found guilty by a

jury of rape and sentenced to 50 years.

The facts of the offense, as set out in the District Court's Memorandum Opinion (App. A), are:

> "On April 17, 1980, Testa's victim was employed as a singer at a hotel in suburban Rosemont. At approximately 2 a.m., she left work and walked to her car at the far end of the hotel's parking lot. As she reached her car, Testa grabbed her from behind and spun her around, holding her by the throat. Testa demanded she open her car door. When she refused, Testa began strangling her. After forcing her into the car, Testa held her and began grabbing her hair. During the ensuing struggle, Testa pulled out handfuls of hair from the victim's head. He then forced her to have sexual intercourse with him." (App. A, pp. App. 2-3)[2]

There is no dispute that (a) no

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[2] See also App. A, p. App. 17, where the District Court sets out the Illinois appellate court's summary of the sentencing judge's findings.

weapon was used, and (b) no permanent or life-threatening physical injury was inflicted.

The sole basis for the trial court's imposition of an extended term sentence, was the court's finding that defendant's offense called for application of a statutory extended-term provision for felonies "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." Ill.Rev.Stat. ch. 38, par. 1005-5-3.2(b)(2). The penalty for rape, without extended-term sentencing, was 6 to 30 years. Under the extended-term statute, pursuant to which the court sentenced defendant to 50 years, the penalty was 30 to 60 years. (See statutes in App. C, pp. App. 24-26.)

REASONS FOR GRANTING CERTIORARI

1. Defendant's 8th and 14th Amendment rights are violated by application of a statute that permits substantial enhancement of a sentence - from a possible 6 to 30 years, to a possible 30 to 60 years - where a sentencing entity finds the offense was "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty," Ill.Rev.Stat., ch. 38, par. 1005-5-3.2(b)(2), where neither State statute nor State decisional law defines that phrase, so that a sentencing court's decision can be totally arbitrary and capricious, contrary to this Court's constitutional holdings in Maynard v. Cartwright, 486 U.S. 356, 100 L.Ed.2d 372 (1988), and Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 (1980).

2. The decision below, rejecting the above argument by denying habeas relief, conflicts with principles of federal constitutional law expressed by this Court in Maynard v. Cartwright, 486 U.S. 356, 100 L.Ed.2d 372 (1988), and Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 (1980), since there is no rational basis for limiting such principles to death penalty cases and not applying such principles to term-of-years sentences, as here.

3. The Court of Appeals should have granted certificate of appealability to review the District Court's dismissal of defendant's habeas petition raising the above issues, which are clearly debatable and deserving of review.

Introduction: Defendant's constitutional rights were violated when he was sentenced to 50 years under a statutory provision that permitted an extended term (i.e., greater than normally permitted) because of the "heinous" nature of the offense because the provision, Chap. 38, sec. 5-5-3.2(b), due to its vagueness, is facially invalid, in that it violates the 8th Amendment to the U.S. Constitution and the due process clause of the 14th Amendment to the U.S. Constitution. The facial invalidity of the extended-term provision is underscored by examining the facts of

this case, because here, finding that defendant's conduct falls within the "heinous" provision, is patently unreasonable.

ARGUMENT

[combining Points 1 & 2 above]

The extended term provision here violates the 8th and 14th Amendments, because ANY application of a sentencing statute with no discernable standards is inherently unfair and inhumane. It violates established principles of constitutional law as set out by this Court in Maynard v. Cartwright, 486 U.S. 356, 100 L.Ed.2d 372 (1988), and Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 (1980). There is no rational basis for limiting such holdings to death penalty cases. The constitutional principle is

equally applicable to cases involving terms of years.

This Court in Maynard v. Cartwright, 486 U.S. 356, 100 L.Ed.2d 372 (1988), held that permitting an enhanced sentence - there, a death sentence - on the standard that the offense was "especially heinous, atrocious, or cruel," was unconstitutional, because it permitted enhancement on no standard, thereby permitting "arbitrary and capricious" increase of sentence, solely on the subjective view of the sentencing entity. In Maynard v. Cartwright, id. at 362, 100 L.Ed.2d at 381, this Court relied on Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 (1980), which held that permitting an enhanced sentence -

there, a death sentence - on the standard that the offense was "outrageously or wantonly vile, horrible or inhuman," was unconstitutional, because it allowed for arbitrary and capricious application of the enhanced sentence (there, death penalty).

Surely, if the standard in a death case, was the standard as in the Illinois statute here at issue, the statute would similarly be held unconstitutional, via precedent of these two decisions.

In death penalty cases where similar language [in an Arizona statute] was upheld, it was because the specific statutory language had been limited and defined in scope by State decisional law. Walton v. Arizona, 497 U.S. 639,

111 L.Ed.2d 511 (1990); Lewis v. Jeffers, 497 U.S. 764, 111 L.Ed.2d 606 (1990). That is not the situation in the case at bar. There is no Illinois statutory or decisional law limiting the scope of the "heinous" language here at issue.

The 7th Circuit has held that statutes such as that here, which would be in violation of the 8th Amendment, if applied to death cases, are nonetheless constitutional, even though they remain "arbitrary and capricious," where the sentence is not a death sentence but a sentence for a term of years. Holman v. Page, 95 F.3d 481 (7 Cir. 1996); Barnhill v. Flannigan, 42 F.3d 1074 (7 Cir. 1994); Peeples v. Greer, 739 F.2d

262 (7 Cir. 1984).[3] The District Court, in ruling against defendant, relied on these 7th Circuit cases. (App. A, p. App. 14)

The 7th Circuit interpretation of application of the 8th Amendment is wrong. The 8th Amendment applies equally to cases involving the death penalty, and cases involving a term of years.

An 8th Amendment violation is not limited to life sentences, or even to death sentences. It can be found with respect to ANY KIND of punishment - including a term of years (Solem v. Helm, 463 U.S. 277, 77 L.Ed.2d 637 (1983), per the 7th Circuit in Peeples

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[3] These were all murder cases where life sentences were imposed.

v. Greer, supra) - if the punishment is shockingly unusual or disproportionate. In essence, the argument is, that a disproportionate sentence is cruel and unusual.

This Court has held that the use of denationalization as a punishment violates the 8th Amendment. Trop v. Dulles, 356 U.S. 86, 2 L.Ed.2d 630 (1958).

See also Weems v. United States, 217 U.S. 349, 54 L.Ed. 793 (1910) (cruel and unusual punishment, to sentence Philippine government official convicted of forgery to 12-20 years followed by loss of various civil liberties including being under surveillance), "which we explained as involving punishment of a 'unique nature.'"

Harmelin v. Michigan, 501 U.S. 957, 963, 115 L.Ed.2d 836, 844 (1991).

In Testa's case, the District Court did not make reference to - as it [apparently] did not find - any non-murder cases where the 7th Circuit had upheld the "exceptionally brutal or heinous" language of the extended term statute based on the statute not being unconstitutional under the 8th or 14th Amendment. (App. A, pp. App. 1-21) Respectfully, undersigned, upon considerable research, has not found any such decisions, either. While we did discover a recent decision upholding, against an 8th Amendment attack, an extended term sentence of 55 years for multiple burglaries, the sentence there was extended on the basis of the

objectively ascertainable standard of the victims being over 60 years of age, not, as in Testa's case, under the subjective "exceptionally brutal or heinous" provision. Bocian v. Godinez, 101 F.3d 465, 472-73 (7 Cir. 1996).

Illinois sentencing law provides other, non-vague bases for imposing extended term sentences that are specific and objectively ascertainable, such as age of victim, number of victims, etc. Such other factors triggering longer sentences under Illinois extended-term sentencing are clear and not vague, such as sentence being increased due to the specific, definite young, or elderly, age of the victim (under 12 years of age, or over 60, per 730 ILCS 5/5-5-3.2(b)(4)(i) &

(ii)); or where multiple victims were killed, 730 ILCS 5/5-5-3.2(b)(3); or where the defendant is a group participant in a sexual assault, 730 ILCS 5/5-5-3.2(b)(5). In such circumstances, the factor that brings on the longer sentence is clearly defined in the statute itself. The factors in THIS case are not specific and not clearly defined, either in the extended-term statute itself, or in any other Illinois statutory or decisional law.

There is no distinction between the facts of this case (see pp. 5-6; App. A, pp. App. 2-3, App. 17) and the facts of any [forcible] rape case, that make the defendant's activity in any way qualify as activity that is "exceptionally brutal or heinous behavior indicative of

wanton cruelty." Here, (a) no weapon was used, and (b) no permanent or life-threatening physical injury was inflicted.

The fact that the court found the rape here - involving the pulling out of hair, but no weapon and no permanent injury[4] - to be "exceptionally brutal or

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[4] The punishment for rape in Illinois at the time of defendant's offense, was 6 to 30 years. Under Illinois law, determining the sentence to be imposed within a given range, includes consideration of all relevant aggravating and mitigating factors. Aside from criminal background, other matters to be considered in aggravation include precisely the kinds of factors that were utilized here to rationalize imposition the extra 20 years under the extended-term provision.

Matters such as the fact that the assailant pulled the victim's hair, or that he "throttled" her, may be good reason to impose a sentence at the top end of the 6 to 30 year range. They are <u>not</u> also good reason to add an extra 20 years to the top of the prescribed range, as here.

heinous" under the statute, serves to demonstrate that the statute permits imposition of an extended term based on standardless discretion. Its application is necessarily "arbitrary and capricious" as forbidden by Maynard v. Cartwright, 486 U.S. 356, 100 L.Ed.2d 372 (1988), and Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 (1980).

III. The Court of Appeals should have granted certificate of appealability to review the District Court's dismissal of defendant's habeas petition raising the above issues, which are clearly debatable and deserving of review.

Certificate of appealability should have been allowed, because defendant has made a substantial showing of denial of a constitutional right, and the issues here are deserving of further proceedings, the court could resolve

them differently, and they are at least debatable among reasonable jurists. Lozada v. Deeds, 498 U.S. 430, 432, 112 L.Ed.2d 956, 960 (1991)[5]; accord, Flieger v. Delo, 16 F.3d 878, 883 (8 Cir. 1994). Under standards as thus set by this Court, Lozada v. Deeds, supra, the 7th Circuit should have granted certificate of appealability.

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[5] This decision, rendered under the former Act ("certificate of probable cause") applies equally to "certificate of appealability" under the present Act; for a certificate of appealability under the new Act is issued upon the same standard as a certificate of probable cause under the prior Act. Lennox v. Evans, 87 F.3d 431 (10 Cir. 1996).

CONCLUSION

Certiorari should be allowed.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDIX

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA, ex rel	)	
THOMAS TESTA,	)	
Petitioner,	)	
vs.	)	**No. 97 C 2826**
KENNETH DOBUCKI,	)	
Respondent.	)	

[dated October 16, 1997]

MEMORANDUM OPINION AND ORDER

Following a jury trial, Thomas Testa ("Testa") was convicted of rape and was sentenced pursuant to an Illinois statute that provides extended prison terms for felonies "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." Testa petitions for habeas corpus pursuant to 28 U.S.C. § 2254.

BACKGROUND

The factual findings of a state trial or appellate court are presumed true in a federal habeas proceeding unless the petitioner rebuts the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Testa asserts the state court's factual findings are "manifestly erroneous." He provides no evidentiary support for this conclusory assertion. Thus, the following facts are drawn from the Illinois appellate court *[page 2]* following facts are drawn from the Illinois appellate court *[sic.; duplication in original]* opinion affirming Testa's conviction.

On April 17, 1980, Testa's victim was employed as a singer at a hotel in

suburban Rosemont. At approximately 2 a.m., she left work and walked to her car at the far end of the hotel's parking lot. As she reached her car, Testa grabbed her from behind and spun her around, holding her by the throat. Testa demanded she open her car door. When she refused, Testa began strangling her. After forcing her into the car, Testa held her and began grabbing her hair. During the ensuing struggle, Testa pulled out handfuls of hair from the victim's head. He then forced her to have sexual intercourse with him. Following a jury trial, Testa was convicted of rape and was sentenced to 50 years in the Illinois Department of Corrections, to be served consecutively with a 15-year sentence for a prior

felony conviction. The trial court sentenced Testa pursuant to an Illinois law that permits extended term sentences for felonies "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." Ill.Rev.Stat. 1987, ch. 38, par. 1005-503.2(b)(2).

On direct appeal, Testa raised seven claims. Among the alleged errors, Testa claimed the trial court abused its discretion by imposing an extended term sentence because his conduct was neither brutal nor heinous, he did not carry a weapon, and the victim was not verbally threatened. The Illinois *[page 3]* appellate court rejected Testa's claims and affirmed his conviction and sentence. People v. Testa, 125 Ill.

App. 3d 1039, 466 N.E.2d 1126 (1984). Testa raised several new issues in a petition for post-conviction relief in state court, claiming his trial and appellate counsel provided ineffective assistance by failing to raise these issues on direct appeal. The trial court dismissed Testa's petition without an evidentiary hearing, and an Illinois appellate court affirmed the dismissal. The Illinois Supreme Court denied Testa's petition for leave to appeal. On April 22, 1997, Testa filed this petition for writ of habeas corpus. He argues the extended term statute under which he was sentenced is (1) unconstitutional on its face because "heinous" is unconstitutionally vague; (2) unconstitutional as applied because

his crime was not heinous; and (3) violative of the Eighth Amendment because the application of a sentencing statute with no discernable standards is inherently unfair and inhumane. In addition, Testa argues he was denied effective assistance of trial and appellate counsel because he failed to challenge the extended term statute as unconstitutional on its face and as applied.

DISCUSSION

I. Habeas Corpus Procedural Requirements

Testa must clear two procedural hurdles before the court may *[page 4]* reach the merits of his habeas corpus petition: exhaustion of remedies and procedural default. Rodriguez v. Peters, 63 F.3d 546, 555 (7th Cir. 1995)

(citations omitted). A habeas corpus petitioner exhausts all state remedies when (1) he presents his claims to the highest state court for a ruling on the merits, Farrell v. Lane, 939 F.2d 409, 410 (7th Cir. 1991), or (2) no state remedies remain available to the petitioner at the time his federal habeas petition is filed. Id. (citing Engle v. Isaac, 456 U.S. 107, 125 n.28 (1982)). The parties do not dispute Testa has exhausted his remedies.

Procedural default may occur in one of two ways. First, the petitioner may fail to raise fairly and properly an issue on direct appeal or post-conviction review. Rodriguez, 53 F.3d at 555 (citations omitted). Alternatively, the state court may rely

on a state procedural bar as an independent and adequate ground for its disposition of the case. Caldwell v. Mississippi, 472 U.S. 320, 327 (1985). It is undisputed the Illinois state courts were afforded a fair opportunity to consider the claims presented in Testa's habeas petition. Although on direct appeal Testa challenged his sentence as an abuse of discretion and not on constitutional grounds, the Illinois courts did not rely on procedural default in disposing of Testa's constitutional arguments. Accordingly, Testa has not procedurally defaulted any of his claims, and this court may reach the merits of his petition. Testa has the burden of showing the state court's *[page 5]*

[adjudication "resulted in a decision that was contrary to, or involved an unreasonable - sic.; italicized words omitted from original] application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

II. Vagueness and the Imposition of an Extended Term Sentence

Testa argues the statute under which he was sentenced is (1) unconstitutional on its face because "heinous" is unconstitutionally vague; (2) unconstitutional as applied because his crime was not heinous; and (3) violative of the Eighth Amendment because the application of a sentencing statute with no discernable standards is inherently unfair and inhumane.

Respondent[1] argues Testa fails to state a claim upon which habeas relief may be granted, because Testa's challenge to the term "heinous" is "premised solely upon Illinois law and does not implicate federal constitutional concerns." This argument is meritless. Testa plainly alleges federal constitutional violations.

The Illinois statute permits extended term sentences for felonies

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[1] Rule 2 of the rules governing § 2254 cases provides that where a petitioner is presently incarcerated, the proper respondent is the state officer having custody of the petitioner. Kenneth Dobucki states he was incorrectly named as a respondent, because Testa is currently incarcerated at Hill Correctional Center, where the warden is Richard B. Gramley. Accordingly, Kenneth Dobucki is dismissed from this action and Richard B. Gramley is substituted as the party respondent.

"accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." Ill. Rev. Stat. 1987, ch. 38, *[page 6]* par. 1005-5-3.2(b)(2). Testa argues the statute (1) fails to provide adequate notice of what conduct is covered by the statutory language, and (2) fails to provide meaningful guidance to authorities called upon to enforce its provisions. See Kolender v. Lawson, 461 U.S. 352, 357 - 58 (1983); Smith v. Goguen, 415 U.S. 566, 574- 75 (1974). "Vagueness for due process purposes entails 'lack of notice, and hence may be overcome in a specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined

in light of the facts of the case at hand.'" Holman v. Page, 95 F.3d 481, 487 (1996) (citing Maynard v. Cartwright, 486 U.S. 356, 361 (1988)). Testa does not claim he lacked notice that viciously attacking a woman -- strangling her and throttling her, throwing her into her car, pulling handfuls of hair out of her head as she tried to resist, and then raping her -- might result in a fifty year prison term. Nor could he. The Seventh Circuit has consistently rejected vagueness challenges to the Illinois extended term statute. See Holman, 95 F.3d at 486 - 87; Barnhill v. Flannigan, 42 F.3d 1074, 1079 (7th Cir. 1994); Peeples v. Greer, 739 F.2d 262 (7th Cir. 1984). As the Holman court explained:

> [T]he Constitution does not require ... a statutory laundry list of precisely defined "heinous" acts or detailed descriptions of how one must act or what one must do to commit "wanton cruelty" before life *[page 7]* imprisonment may be imposed.
>
> If a perfect definition of "exceptionally brutal" or "heinous" or "wanton cruelty" is beyond us, the definitions commonly used are adequate to the task....

Id. at 487. Testa fails to support his assertion that the Illinois extended term statute violates due process. Thus, habeas relief is unwarranted on this claim.

Nor does Testa support his assertion that the Illinois extended term statute violates the Eighth Amendment. In capital cases, the Supreme Court has recognized a separate vagueness inquiry under the Eighth Amendment. See Maynard, 486 U.S. at 361

- 62 ("Claims of vagueness ... under the Eighth Amendment ... assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them ... with the kind of open-ended discretion ... held invalid in Furman v. Georgia."). The Seventh Circuit has repeatedly held that Eighth Amendment vagueness inquiries are an anomaly of the Supreme Court's death penalty jurisprudence, and are not applicable in noncapital cases. See Holman, 95 F.3d at 487; Barnhill, 42 F.3d at 1079; Peebles, 739 F.2d at 164 - 65 (all life imprisonment cases). Testa fails to explain why an Eighth Amendment vagueness inquiry is applicable to his 50 year sentence under the extended term

statute, when the Seventh Circuit has consistently rejected this inquiry in more compelling circumstances. Thus, habeas relief is unwarranted on this claim. *[page 8]*

Third, Testa argues the extended term statute was unconstitutionally applied. The length of sentence imposed for the commission of a state felony is "purely a matter of legislature prerogative." Rummel v. Estelle, 445 U.S. 263, 274 (1980). Furthermore, the Eighth Amendment contains no proportionality guarantee. Harmelin v. Michigan, 501 U.S. 957, 965 (1991). In Illinois, rape is a Class X felony punishable by 6 to 30 years of imprisonment. Ill. Rev. Stat. 1981, ch. 38, par. 1005-8-1 (3). Where the crime

is accompanied by "exceptionally brutal or heinous behavior indicative of wanton cruelty," a Class X felony is subject to the imposition of an extended term sentence of 30 to 60 years. Ill. Rev. Stat. 1981, ch. 38, par. 1005-8-2.

> Testa advances the following argument:
> Any assertion that defendant's actions were more heinous than in any given case of forcible rape, is an absurdity, because where, the evidence as to rape itself was no more heinous than in any common, run-of-the-mill rape....There is nothing here to render this offense substantially "worse" than any "ordinary" forcible rape....No justification for a 50-year sentence.

Hab. Mem. at p. 3. The sentencing judge, however, found justification for an extended sentence, and an Illinois appellate court rejected Testa's claim that the imposition of an extended sentence was an abuse of discretion.

The Illinois appellate court summarized the sentencing judge's findings:

> "I consider it a heinous case because the evidence shows beyond a reasonable doubt ... [defendant] stalked the victim late at night in a parking lot. Stalked *[page 9]* her. Grabbed her, and when she tried defending herself he throttled her with his hands." The court referred to a photograph of the victim, State's exhibit 10, and commented that there were "[f]inger marks on the victim's throat where ... [defendant] throttled her and threw her into her car." The court further noted that defendant "[t]ore out whole handfuls of hair," and observed that another photograph of the victim showed "the viciousness of the attack." The court concluded: "In this Court's mind if this isn't torture than *[sic.]* I don't know what torture is. To rip out handfuls of hair --- It is this Court's opinion if [the victim] resisted any further Tom Testa may have killed her."

Testa, 125 Ill. App. 3d at 1050, 466 N.E.2d at 1135. Testa argues an offense cannot be considered heinous based only

on the elements of the offense, when "nothing substantially in addition was involved." The record does not support Testa's assertion. The definition of rape does not include strangling, throttling, and pulling handfuls of hair out of a woman's head as she tries to resist. The sentencing judge plainly stated his bases for finding this rape exceptionally brutal and heinous in nature, including photographs of the victim taken after Testa's brutal attack. After considering Testa's prior convictions for rape and deviate sexual assaults, and noting that Testa was out on bond for an unrelated attempted rape when he committed this rape, the judge concluded Testa exhibited little rehabilitative potential. The judge

thus sentenced Testa to 50 years in prison. Testa fails to establish the sentencing judge's analysis and sentencing decision were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). *[page 10]*

III. Ineffective Assistance of Counsel

Testa argues he was denied effective assistance of trial and appellate counsel because they failed to challenge the extended term statute as unconstitutional on its face and as applied. To state a valid claim for ineffective assistance of counsel, Testa must show (1) his counsel's performance was objectively unreasonable and (2)

there exists a reasonable probability that, but for his lawyer's alleged errors, the results would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Testa cannot satisfy either prong of the Strickland test. For the reasons discussed above, Testa's constitutional arguments challenging the Illinois extended term statute were doomed to fail. Thus, counsel was objectively reasonable in not raising these arguments, and Testa was not prejudiced. Accordingly, habeas relief is unwarranted on this claim.

CONCLUSION

Thomas Testa's petition for writ of habeas corpus is denied.

ENTER:

_____
Suzanne B. Conlon
United States District Judge

October 16, 1997

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 25, 1998
Decided October 13, 1998

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

THOMAS TESTA,
Petitioner-Appellant,

No. 97-3909 v.

RICHARD B. GRAMLEY,
Respondent-Appellee.

Appeal from the United States
District Court for the Northern
District of Illinois, Eastern Division.

Ho. 97 C 2826

Suzanne B. Conlon,
Judge.

ORDER

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court

denied the petition and declined to issue a certificate of appealability. Petitioner now has filed a request for a certificate of appealability with this court.

This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

APPENDIX C

Constitutional Provisions Involved

The 8th Amendment to the U.S. Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The 14th Amendment to the U.S. Constitution provides in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

Statutes Involved

Ill.Rev.Stat. 1980, ch. 38, par. 1005-5-3.2(b)(2) provides:

> "§ 5-5-3.2 Factors in Aggravation.
>
> * * *
>
> (b) the following factors may be considered by the court as reasons to impose an extended term sentence under Section 5-8-2 [ch. 38, par. 1005-8-2] upon any offender:

* * *

(2) When a defendant is convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty;"

Ill.Rev.Stat. 1980, ch. 38, par. 1005-8-2 provides in pertinent part:

§5-8-2. Extended Term. (a) A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 [ch. 38, par. 1005-8-1] for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 [chap. 38, par. 1005-5-3.2] were found to be present. Where the judge finds that such factors were present, he may sentence an offender to the following:

* * *

(2) for a Class X felony, a term shall be not less than 30 years and not more than 60 years."

Ill.Rev.Stat. 1980, ch. 38, par. 1005-8-1 provides in pertinent part:

"§ 5-8-1. Sentence of Imprisonment for Felony. (a) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

* * *

(3) except as otherwise provided in the statute defining the offense, for a Class X felony, the sentence shall be not less than 6 years and not more than 30 years."